EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr S Gilmartin	v	**1. Oughtred & Harrison (Facilities) Limited**
		2. Mathew Boswell
		3. Janet Fincham

PRELIMINARY HEARING

Heard at: **Hull** **On:** **13 & 14 August 2018**

Before: **Employment Judge Wedderspoon**

Members: **Mr C Childs**
Mr M Brewer

Appearance:

For the Claimant: **Mr Weiss, of Counsel**

For the Respondent: **Mr Nuttman, Solicitor**

JUDGMENT

1. The unanimous Judgment of the Tribunal is that the Claimant's claims of harassment because of age and direct age discrimination are not well founded and are hereby dismissed.

2. Section 111A of the Employment Rights Act 1996 applies. In the circumstances the documents in section D of the agreed trial bundle are excluded (namely pages 161 to 193).

3. There will be a Telephone Preliminary Hearing in this matter on 8.10.2018 at 10 a.m. with an estimated length of hearing of 1 hour.

REASONS

Claims

1. The Claimant brings the following complaints :-
   1.1 Harassment related to age contrary to section 26 and section 39 (2)(d)of the Equality Act 2010.
   1.2 Direct age discrimination contrary to section 13 and 39 (2)(c) and (d) of the Equality Act 2010.
   1.3 Unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996.
   1.4 Breach of contract and/or unauthorised deduction from wages contrary to Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and/or section 13 of the Employment Rights Act 1996.

2. At a Telephone Preliminary Hearing, on 23rd March 2018, it was determined by Employment Judge Little, that the Employment Tribunal would hear the age discrimination complaints and make a determination pursuant to section 111A of the Employment Rights Act 1996 only. In the circumstances the Tribunal dealt with these matters only.

Issues

3. At the commencement of the hearing the parties were invited to agree a list of issues. The parties agreed the following issues (I set these out and replicate the agreed document and add my comments) :-

R1 and R2 - harassment

   3.1 Did the respondents engage in conduct as follows :-
   3.2 (R1, R2) was the claimant demoted on 8 May 2017
   3.3 (R1, R2) was the claimant marginalised and undermined by any of the following :-(a) on 17 May 2017 when the claimant's IT equipment and workstation was moved to the ground floor where the sales team sat? (b) on 17 May 2017 did Mathew Boswell without the Claimant's prior

knowledge brief the Claimant's team mobility. Aftersales and warranty that they no longer reported to him but now reported to Jeff Brown?

(c) On 1 June 2017 when Matthew Boswell sent an email to all concerned with WAV checks stating that the Claimant has not to be included on the distribution list anymore?

R1, R2 and R3 harassment

3.4 At meetings on 1 and 7 August 2017 with Matthew Boswell and Janet Finch was the claimant's dismissal presented as a fait accompli

3.5 It is admitted Matthew Boswell and Janet Finch conducted both the dismissal and grievance meetings

3.6 In so far as any of the aforesaid conduct is found proven was it unwanted?

3.7 Was it related to the protected characteristic of age?

3.8 Did the conduct have the proscribed purpose or effect the latter taking into the account the claimant's perception and whether it was reasonable for it to have the effect?

3.9 Direct discrimination

3.10 Is it disputed that the respondent(s) subjected the claimant to the following treatment :-

3.10.1 was the claimant suspended from work

3.10.2 It is admitted the claimant was dismissed from work

3.10.3 As the acts at paragraphs 3.2, 3.3 (a) to (c), 3.4, 3.5, 3.11.1, 3.11.2, did the Respondents treat the Claimant less favourably than they treated or would have treated others on the grounds of age. The Claimant compares himself to Jeff Brown, a manager aged 50; further or in the alternative he being a manager in the age group of 60 to 65 compares himself to a notional manager in the age group of 50 to 55.

3.11 Section 111A of the ERA 1996

3.11.1 Did the first respondent in meetings on 1 and 7 August 2017 and in negotiations via correspondence up to 24 October 2017 behave in a way that was improper or was connected with

improper behaviour within the meaning of section 111A (4) ERA 1996. Specifically :-

3.11.2 Was the dismissal presented as a fait accompli

3.11.3 Did no one explain there were protected conversations or what that was supposed to mean

3.11.4 Was the claimant not informed he had 10 calendar days to consider the written terms of the settlement agreement

3.11.5 Did the first respondent communicate information to the claimant that they knew or to be untrue, inaccurate or misleading

3.11.6 If yes, is it just that evidence of negotiations in the meetings on 1 and 7 August 2017 and via correspondence up to 24 October 2017 is admissible?

Time

3.12 The Respondent in submissions contended that some of the Claimant's claims were out of time. The Claimant was provided with an opportunity to make submissions on these issues. The issues to be considered were

3.12.1 Does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

3.12.2 Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

Witnesses

3.13 The Employment Tribunal heard from the Claimant and from the Respondent heard from Ms. Janet Fincham, Human Resources Manager, North and Mr. Matthew Boswell, Business Development Director.

Bundle

4. The Tribunal was provided with an agreed bundle of 205 pages.

Applications at the commencement of the hearing

5. At the commencement of the hearing, the Respondent made an application for disclosure of the claimant's bank statements. The application was made on the basis that the respondent believes that since the claimant's employment terminated, he has been paid for work at two companies; Lateral Designs and Brook Miller and the claimant had submitted a schedule of loss on 23 March 2018 which failed to account for any income earned from these two businesses. The respondent had requested further information but had been informed that the claimant did not have any contractual documentation evidencing receipt of payment from these companies. The respondent sought disclosure of bank statements evidencing receipt of income from November 2017 to date and if the documents were not disclosed it would seek to strike out the claim as an abuse of process.

6. The Claimant submitted that he had invoiced Brook Miller for the sum of about £100 on 18 April 2017. There was no requirement to provide an updated schedule and the hearing was limited to determining the liability of the age discrimination complaints and section 111 of ERA 1996 issue. Remedy was not a live issue at present and it would be proportionate to simply park this issue to a later date. There was no prejudice suffered by the respondent at this stage by not having the bank statements. The claimant could not provide the bank statements today but could produce them at a later date if required.

7. The Tribunal reminded itself that the duty of disclosure in the Employment Tribunal, pursuant to the Employment Tribunal rules, reflects the duty under the Civil Procedure Rules. If remedy was a live and current issue the Tribunal would have concluded that the bank statements, as the only means of establishing income from other sources, should be disclosed. However, the Tribunal concluded that, as the hearing was limited to determining liability on the age discrimination complaints and section 111A of ERA 1996 complaint, that disclosure of the bank statements is not necessary for the purposes of hearing these issues. The Tribunal indicated its expectation that these would be

disclosed by the claimant for the period from November 2017 to date if remedy is to be determined at another hearing.

8. The Claimant also sought to adduce some documentation from Mr. Kenyon, a former employee of the First Respondent, on the basis that it was submitted it was inconsistent with paragraph 30 of the second respondent's witness statement. Mr. Boswell stated at paragraph 30 of his witness statement that age had nothing to do with the termination of the claimant's contract and that he had retained Mr. Kenyon (older than the claimant) but he was poached by a competitor. The claimant wished to rely upon some email correspondence; the claimant stated this correspondence evidenced that Mr. Kenyon was actually pushed out by Mr. Boswell because he was of a certain age and this was relevant to the credibility of Mr. Boswell.

9. The respondent resisted this application stating the email correspondence between Mr. Boswell and Mr. Kenyon was "without prejudice" material and therefore could not be relied upon; the respondent did not waive privilege and in any event did not evidence what the claimant said it did; and the respondent provided further correspondence to be considered to provide, it submitted, context.

10. The parties agreed the Tribunal could consider all the documentation in order to determine the admissibility of the documents. The Tribunal took the view it was wholly disproportionate to spend a significant period of time during a two day listed hearing to first determine whether the correspondence was truly without prejudice or not in the context of the limited assistance it could provide to the Tribunal in determining the relevant issues in this case. Further, on the face of the email relied upon by the claimant it rather looked as if Mr. Kenyon did not enjoy the management style of the second respondent as opposed to suggesting the second respondent was ageist. Mr. Kenyon was not a witness in the case. In the circumstances the Tribunal concluded pursuant to the overriding objective it would not consider either parties documentation but rather focus on the evidence and documentation included in the agreed bundle.

Facts

11. The claimant, (who was born on 14 March 1953 and is now aged 65 years) was employed by the Respondent from 9th March 2015 (when aged approximately 62 years) as a Business Development - Manager Mobility. He was dismissed on 30th November 2017.

12. The claimant was headhunted by the first respondent in late 2014 and was recruited by Ms. Fincham, the third respondent (who is a similar age to the Claimant). He was initially line managed by Graham Hunter, Finance Director. In around 2017, the second respondent, Matthew Boswell, joined the business as Head of Sales and he then lined managed the claimant.

13. The first respondent specialises in the conversion of vehicles to make them accessible, for example ambulances or vehicles, for individuals with mobility needs. The Respondent's work included planning sales proposals/events to maximise opportunities; making sales to organisations (such as NHS Trusts) and individuals (such as disabled people who need adaptations); and after care work such as warranties, maintenance and repairs.

14. When the claimant joined the business the relationship between Motability operations and the respondent had deteriorated to such an extent that Motability operations was considering removing the first respondent from its list of suppliers to the motability scheme. The business was split into different divisions including mobility; ambulance sales (where Roger Ham held the senior role aged 58 years) and PTS (Patient Transport Services) where David Kenyon held the senior role aged 65 years) and WAV and welfare departments (where Ian Scofield worked, and was in his late 40s).

15. The claimant put in place a recovery plan and increased customer satisfaction scores on the motability scheme by March /April 2016. In the summer of 2016, the claimant was given the additional responsibility of managing warranty and aftersales and the motability team taking the number of employees reporting to the claimant to 13 individuals. Five of these employees were mainly involved in

coach work. On receipt of pay information concerning other senior managers the claimant noted that he was paid less and negotiated an increase in his pay.

16. In the claimant's role as Business Development Manager-Mobility his main duties consisted of the day to day running of the motability, warranty and aftersales teams; improving and maintaining an excellent working relationship with motability and other outside agencies; recommending new models, enhancing current offerings and work with the respondent's departments in the development of WAVs; ensuring demonstrations of WAVs were carried out correctly; ensuring continuous professional development of all staff; providing management with accurate and timely reports as required; developing and setting up a plan for the annual WAV checks and assisting and advising management on quarterly pricing to motability.

17. The claimant was a success in his role and he increased customer satisfaction substantially.

18. Sales was split into different divisions including mobility where the Claimant worked; ambulance sales where Roger Ham held the senior role (aged 58 years); PTS (Patient Transport Services) where Dave Kenyon held the senior role (aged 65 years); WAV and Welfare departments (where Ian Scofield worked aged late 40s).

19. However, the first respondent lost a major contractor, the Mercedes Sprinter and made a significant loss (over £1.5 million in 2016) and became at risk of becoming insolvent. The owners sold the Company. In April 2016, the Company was purchased by Endless LLP, a turnaround investor and it appointed Directors to try and stop the losses and aimed to turn the company around to make it a success. The company was expected to trade at a loss again in 2017. A new structure was implemented to save costs. The claimant accepted he was asked to lose two members of his team and he made proposals to keep them. The implemented changes included making 19 staff in the manufacturing side of the business redundant and negotiating with the GMB trade union over

changes to shift patterns and contracts of staff to give greater flexibility. A collective agreement was reached for a new basic 38 hour a week contract; compulsory increase of hours on notice for up to 45 hours a week for up to 6 months during the year at basic rate only; and stand down staff on notice in return for 75% pay.

20. Further, the second respondent took the decision to split the teams into teams that worked on pre sales and post sales to ensure that employees played to their strengths i.e. sales team focused on sales and lower paid customer care employees could deal with warranty issues and aftercare.

21. During the week commencing 8 May 2017 the first respondent met with the claimant. The Tribunal finds that neither party retained a detailed recollection of what was said at the meeting but the Tribunal finds that the first respondent was direct to the claimant in expressing he wanted the claimant to focus on growing the business, namely sales as the mobility expert and Roger Keen and Raj Singh were to report to him directly. Contrary to the claimant's evidence, the Tribunal finds that this meeting was cordial. The first respondent engaged in a comprehensive discussion with the claimant about changes. Further, the Tribunal finds that the claimant did not perceive this change as a demotion but rather an acceptance that the second respondent wanted him to have a more focused approach to his role; so honing his considerable expertise and experience. This is in part corroborated by the cordial email correspondence dated 19 May 2017 between the claimant and the second respondent where the second respondent lists the items of the agenda for the future months and invites the claimant to volunteer ideas stating *"we can meet next week to plan out the detail of the above and how we can bring this to life to drive sales upwards.."* The claimant responded in a friendly manner *"Thanks Mathew we can talk next week over how we achieve the tasks below. Have a good weekend.."* Rather than being at loggerheads, the Tribunal finds the evidence indicates that the claimant and the second respondent were working well together and that the claimant was very much considered part of the team going forward with the joint motive of increasing the success of the business. Further the claimant's own notes of a meeting with the respondent on 21 November

2017 (p.151) shows that the claimant *"agreed.. changes to customer relations etc..and didn't offer any resistance.."*. The Tribunal finds rather being marginalised, the respondent was inviting the claimant to engage in the agenda.

22. The changes implemented by the second respondent returned the claimant to the role he had been brought into do initially. Jeff Brown, (younger than the Claimant in his 50s), Technical Administrator took over managing the day to day customer service for mobility on a temporary basis. He was paid at over 17.5% less per annum than the Claimant. Jeff Brown did not like this role; he found it too stressful and the trial was stopped after about 8 weeks. After this point the team reported to Mr. Boswell. The Tribunal accepts that there was no firm agreement with Mr. Brown upon taking this role he would have an increased salary/bonus. The Tribunal accepts the arrangement was that a review about pay/bonus would take place after the trial but there was no firm agreement.

23. By email dated 19 May 2017 the second respondent emailed Kevin Stevens, Production Manager; Martyn Archer, Managing Director; Graham Hunter, Finance Director and Wes Linton, Head of Engineering about changes to the mobility department. It informed the senior management team that the claimant had moved over to the sales team as the mobility expert; Roger and Raj were to report to the claimant. The respondent stated *"this move allows our key personnel to focus on their core skills. Giving us a real focus on driving sales into our business and offering greater opportunity to enhance our customer's experience."* The Tribunal accepts that this was a sincere intention on the part of the Respondent.

24. Under cross examination, the claimant accepted that the second respondent did discuss with him that he would be moved closer to the sales team but he was not informed about the precise date or time this would take place. On 17 May 2017 whilst he was away from his main place of work in Goole at a meeting, he received a text message from a colleague informing him that his IT equipment had been moved to the ground floor to sit with the sales team. The Tribunal

finds that the failure to inform the claimant about a date or time of this move was more to do with the availability of the I.T. team. It was unfortunate that this was not planned in advance so that the Claimant could have been properly notified. Instead, the move took place at short notice so it had not been practicable to inform the claimant because he was out of the office. The tribunal rejects the contention there was any deliberate attempt to undermine the Claimant.

25. On 22 May 2017 (page 128) the claimant emailed team members to inform them that Jeff Brown had taken over the day to day running of the mobility section/team and going forward reference to him should be made if you have Welcome/In Life checks. He stated "*I would appreciate if you could copy me in so I can help with any unusual issues".* He then stated "*I am now managing mobility sales but I will still be available should anyone want any help".* The Tribunal accepts that in order to avoid any confusion Mr. Boswell emailed Adam Raven, Alan Hunter, Roger Keen and Raj Singh on 1 June 2017 to clarify the changes in line management. This was not an attempt to undermine the Claimant.

26. On 25 May 2017 p.118, the second respondent emailed the claimant. He asked the claimant to consider a number of issues … stating *"we have the base to crack on and you have a clear objective to sell. Jeff is working on some of the back office things that will improve the client experience so all areas are moving in the right direction..".* He was asking the claimant to engage in strategic issues and whether the respondent could learn from its mistakes. The claimant accepted in cross examination that the second respondent was asking him questions as to how he could improve sales. The Tribunal finds that the respondent was not demoting the claimant; the respondent wanted to be successful and wanted the claimant's ideas and support to assist its future success. The respondent believed this could be achieved by the Claimant focusing on sales and made this strategic decision in the interest of the business to survive and prosper.

27. Dave Kenyon was an older employee than the Claimant. He managed PTS. He was retained by the Respondent and negotiated a good package to stay. He was eventually poached by the respondent's competitor.

28. On 1st August 2017 Mr. Boswell and Ms. Fincham met with the claimant. There was a significant evidential dispute about what was precisely said at this meeting. There were no notes of the meeting. The Tribunal concluded that the claimant was informed by Mr. Boswell that it was a confidential meeting and to keep it confidential. He was told it was a meeting which was not admissible in a court or a tribunal and was a protected conversation. The Tribunal reached this conclusion on the basis of the clear evidence of Ms. Fincham, the Human Resources manager, who was present at the meeting and who corroborated Mr. Boswell's recollection. She is an experienced Human Resources professional and informed the Tribunal she had provided Mr. Boswell with a script for the meeting and had he failed to inform the claimant about the nature of the conversation being protected she would have interjected. She is clear that they did inform the claimant about this and under cross examination, the Claimant could not recall that this definitely did not happen. On the balance of probabilities the Tribunal accepts Ms. Fincham's evidence that the Claimant was told at the meeting this was to be a protected conversation.

29. Further the Tribunal finds that the claimant was told that the company was going through a difficult time and still trying to stop losses and some tough decisions needed to be made. Mr. Boswell stated that he had reviewed his structure and saw a different strategic way forward and wished to make the claimant an offer before a formal process. The offer made was for the Claimant to leave his employment on 11 August 2017; paid salary to the end of his employment, no holiday pay excess had to be repaid; paid in lieu of 3 months notice without having to work; paid a tax free sum of £3,500 on the basis he signed a settlement agreement. He was told he could pick up what he wanted to. The Claimant did not ask what these strategic differences were. The Tribunal make no criticism of that and accept that the conversation came as a shock to the Claimant. The Claimant was told he could take time away from

work to think about the proposal. He was told he would need to take independent legal advice. He was not told he was suspended from work.

30. The Tribunal finds that by July 2017 the Respondent considered that a manager could be removed from the roles of mobility and ambulance. This decision would affect both the Claimant and Roger Ham. Mr. Boswell's view was that there was capacity so he could take on responsibility for managing the teams and simply incorporate the work into his own and believed he would achieve the same levels of sales with lower overheads. Ms. Fincham in her evidence described her role as part decision maker. Her evidence was that the Respondent took the decision to change the strategic direction; it could back fill with temps when the Respondent had orders rather than employ numbers of people. Mr. Boswell also believed the Claimant not to be performing well or that he was not suggesting viable ways to increase sales. Ms. Fincham was also mindful of not triggering collective redundancy hitting 20 people; 19 had already been made redundant.

31. On 4 August 2017 Ms. Fincham spoke to the Claimant by telephone to check if he had time to consider the offer and agree to meet again. The Claimant requested that the settlement agreement be sent to him for discussion with his legal representative.

32. The Claimant did not receive the written settlement terms until 5 August 2017. The respondent did not inform the claimant he had 10 days to consider the offer. However the time to consider the offer was extended to 31 August 2017 so that the Claimant was in fact given more than 10 days to consider the offer with the advice of a legal adviser. The claimant accepted in cross examination he did have a choice to accept the offer or not.

33. On 7 August 2017 Mr. Boswell and Ms. Fincham met the Claimant and he asked some questions about the agreement. He requested additional monies for his car allowance during the notice period. The Respondent rejected this because their view was that the Claimant was only entitled to basic pay. The

Claimant also requested a bonus. The Claimant was paid a discretionary bonus of 1.25% of motability payments received for WAV checks.

34. The Claimant asked whether he could go and say goodbye to colleagues. The tribunal reject the suggestion that the claimant's request was refused rather Ms. Fincham stated it was not appropriate because at that time there was no agreement in place that the claimant was leaving the respondent's employment.

35. The meetings between the Claimant and the Respondent were amicable and not confrontational. Following checking the amount of bonus (£483.75) on 8 August 2017 (p.162) Ms. Fincham inserted the bonus figure of £483.75 to the settlement agreement.

36. On 15 August 2017 the Claimant's solicitors contacted the Respondent stating that the Claimant had been dismissed; alleged that the Respondent could not rely upon section 111A of the Employment Rights Act 1996 to keep the conversation privileged; alleged the Claimant had been subjected to age discrimination and included a counter offer of £70,000 (this amounted to two years salary).

37. The Respondent instructed legal representatives who on 24 August 2017 wrote to the Claimant's solicitor extended the deadline to accept the offer to 31 August 2017.

38. On 29 August 2017 the Claimant's solicitors rejected the offer and threatened to lodge a grievance and bring Employment Tribunal claims if a settlement was not reached. Settlement discussions continued throughout September and October 2017. On 2 October the Claimant requested his full pay.

39. By email dated 9 October 2017 the claimant's solicitors reduced their settlement figure to £18,500.

40. Ms. Fincham considered that the respondent had paid the Claimant £6,000 since negotiations had began which was a higher amount than expected. Further, time had moved on and the window to trigger collective consultation had passed and the respondent believed it could move to a fair and open consultation over Mr. Boswell's proposal.

41. On 24 October 2017 Ms. Fincham wrote to the Claimant and stated it was proposed to remove his role and sought to meet with the Claimant on 2 November 2017. Ms. Fincham stated that the Respondent had managed without the role for the last two months and believed that the Respondent could continue to manager in this way going forward. The Claimant did not attend the meeting and did not contact the Respondent.

42. On 6 November 2017 the Claimant contacted Ms. Fincham to state he had been on holiday in Scotland and the meeting was rescheduled for 13 November 2017. On 10 November 2017 the Claimant raised a grievance and requested that redundancy consultation be suspended. The content of the Claimant's grievance was in identical terms to the solicitor's letter dated 15 August 2017 which the Respondent's solicitors had responded to on 24 August 2017.

43. On 13 November 2017 Ms. Fincham replied stating that the Claimant's grievance was linked to the redundancy consultation and so could be dealt with at the same meeting so she wanted it to proceed. At the meeting the Claimant's grievance concerns were discussed.

44. The Tribunal reject the suggestion that the grievance was heard by the second and third respondents who had made decisions about the Claimant's employment with the intention to intimidate the claimant or to cover up any discrimination. The Tribunal finds that the respondent decided to deal with the grievance and incorporate it as part of the meeting. The Tribunal finds that the respondent believed it was the most efficient way to deal with the issues.

45. A further meeting was arranged. On 21 November 2017 the Claimant suggested a new role of field engineer be created for him. The respondent agreed to consider this proposal. The Respondent decided this was not a viable option because the practice of sub-contracting work as and when presented a saving to the business rather than paying for one resource which was unlikely to be used consistently. On 28 November 2017 the Respondent wrote to the Respondent to explain the decision to make him redundant. He was paid in lieu of notice and paid a statutory redundancy payment. The Claimant did not appeal the decision to dismiss him.

46. Other changes took place in the Respondent's business. Roger who had been dealing with the ambulance work left. Georgia who worked in the south of England region and worked on non ambulance trusts came in.

47. The Tribunal rejects the suggestion that Jeff Brown was brought in to do the role. On the evidence heard the Tribunal conclude that Jeff Brown did not have the skills to do the Business manager role.

48. When asked by the Tribunal why he believed his dismissal was related to age, the claimant struggled to be specific but stated that *"in some aspects it was age related".*

49. The respondent's management workforce was made up of staff in a wide range of ages including Wes Linton in his early 50s; Graham Hunter 55 years; Martyn Archer in his 40s; Kevin Stevens aged about 50, Ms. Fincham aged in her 60s; Martyn Archer 59 years ; Mr Boswell aged 40; the Production Director aged in his early 40s. Mr. Kenyon was recruited in his 60s. In 2018 Mr. Boswell was involved in the recruitment of Alan Hunter to the role of Hire Fleet Manager. Mr. Hunter is 60 years of age. Mr. Boswell was unaware of the Claimant's precise age.

Submissions

50. The Respondent provided written submissions on the section 111A point and age discrimination. The Respondent submitted the starting point was **Unilever plc v Procter & Gamble Co (2001) I All ER 783** noting that the without prejudice rule does not prevent the admission into evidence of what one or both parties said or wrote in particular circumstances including unambiguous impropriety. The respondent referred to the case of **Oceanbulk Shipping and Trading SA v TMT Asia Limited & ors (2010) 4 All ER 1011** and stated this case provided authority for looking at without prejudice communications to interpret what a concluded agreement. The respondent stated that this was not considered by HHJ Eady in the **Faithorn** case because there was no concluded agreement. In the case of **Independent Research Services Ltd v Catterall (1993) ICR 1** it was submitted that without prejudice material could be considered if the without prejudice material were suppressed something amounting to a dishonest case would be prosecuted. In the case of **BNP Paribas v Mezzotero (2004) IRLR 508** an employee raised a concern about her treatment following maternity leave. At a "without prejudice" meeting the employer stated it was not viable for the Claimant to return and it was in everyone's interests to terminate her employment. The EAT held it would be an abuse of the without prejudice rule to permit the employer to maintain the veil of privilege and this fell within the umbrella of unambiguous impropriety.

51. In the case of **Faithorn Farrell Timms LLP v Bailey UKEAT/0025/16** the Tribunal permitted the Claimant to rely upon the employer's conduct during without prejudice negotiations, she had initiated as part of the basis of her claim. The EAT held the Tribunal had reached a permissible case management decision. The employer had waived privilege by failing to object within its ET3. Section 111A confidentiality must be read on its own terms which did not import the case law underpinning common law without prejudice privilege.

52. The Respondent submitted that the Claimant's case does not reach the exceptional band to permit the Tribunal to consider without prejudice/protected conversation material. If a person is misled the Employment Tribunal can consider the protected conversation material but the Claimant was not misled. Furthermore there was no age discrimination.

53. The Claimant has the burden to establish facts from which in the absence of an adequate explanation from the Respondent the Tribunal can infer discrimination (see **Igen Limited & ors v Wong (2005) IRLR 258**). The Tribunal can take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established facts which even require an explanation from the Respondent (see **Laing v Manchester City Council & ors (2006) IRLR 748**; followed by **Madarassy v Normura International PLC (2007) IRLR 246**). The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. They are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination **Madarassy v Nomura International PLC (2007) IRLR 246**. In **Network Rail Infrastructure Limited v Griffiths Henry (2006) IRLR 865** the EAT clarified unfairness is not in itself sufficient to establish discrimination. In **Ayodele v Citylink Limited (2017) EWCA Civ 1913** the Court of Appeal explicitly confirmed a two stage approach.

54. The Respondent submitted that the Claimant's claim fails at the first stage. Some people of a similar age to the Claimant were retained. For example, Mr. Kenyon was of a similar age and in fact was paid extra money to be retained. The Claimant's case is a complaint of unreasonable treatment which is insufficient to shift the burden.

55. The Respondent submitted the Claimant was initially hired in a Business development role. His administrative duties were removed so to concentrate on business development. That is not marginalisation.

56. Further, Roger Hamm, aged below 60 years, was dismissed by the Respondent. The Claimant agreed in evidence he knew his equipment was to be moved; his real complaint is that he was not told the date and the time of his equipment; that is not age discrimination. By 22.5.17 email the claimant knows what he is doing and the 1.6.17 email merely clarifies what the Claimant is

doing he was not marginalised. In negotiations, the Respondent extended the period of time for him to consider the offer. There was no attempt to intimidate the Claimant in the grievance process; those persons connected to the process were the right people to hear grievance and provide answers.

57. The Claimant submitted the Respondent's submissions were misconceived. Under section 111A of the Employment Rights Act material can be considered by the Tribunal which is not limited to unambiguous impropriety. The Claimant submitted that 'improper behaviour' is a wider category. The Tribunal was invited to consider the ACAS code. First the Claimant complained he was not given 10 calendar days notice to consider the settlement agreement. It was submitted much of the case law referred to by the Respondent was irrelevant for the purposes of section 111A.

58. It was submitted the lead case is the judgment of HHJ Eady in **Faithorn Farrell Timms LLP v Bailey (2016) IRLR 839.** It was submitted that the Employment Tribunal has a wide discretion. The Claimant's case is that he was not told he was to have a protected conversation; he was not informed about 10 calendar days to consider; he was told of a difference of strategic direction; and he was not informed in reality that this was a redundancy situation. In all those circumstances the Respondent cannot rely upon section 111A.

59. In any event it was submitted this is an age discrimination claim where section 111A does not apply. By reason of the Claimant's age substantial elements of his role were removed. Although the Claimant's pay remained the same in reality there was a loss of management status. The removal of the Claimant's IT equipment without his knowledge was humiliating. Further the meetings of 1st and 7th August with the Claimant were presented as a fait acompli. The reality is that the Claimant was never invited back to work.

60. The Claimant, was replaced by a younger man; by Mr. Boswell. Mr. Ham aged 59 was removed. Mr. Kenyon exits the business to work for a competitor. The changes in the business has meant casualties in the older age bracket. The

Respondent deliberately failed to tell the Claimant about redundancy. The Respondent has raised a new point about collective redundancy; it says it did not want to raise redundancy in case it fell within the obligations of collective redundancy. This was not pleaded and that is of evidential relevance as to its credibility as a reason not to raise redundancy with the Claimant.

61. The Respondent replied that there is a jurisdictional issue. Much of the Claimant's claims are out of time.

62. The Claimant submitted that the Respondent had not suggested this be included on the list of issues but in any event this was a continuing state of affairs. It would be just and equitable to extend time.

Law

63. Section 13 (1) of the Equality Act 2010 (the EqA) states
"A person (A) discriminates against another B if because of a protected characteristic A treats B less favourably than A treats or would treat others.

64. Section 13 (2) of the EqA states
"If the protected characteristic is age A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

65. Section 23 (1) of the EqA states
"On a comparison of cases for the purposes of section 13….there must be no material difference between the circumstances relating to each case."

66. Section 24 (1) of the EqA states
"For the purposes of establishing a contravention of this Act by virtue of section 13 (1) it does not matter whether A has the protected characteristic".

67. Section 26 (1) of the EqA 2010 states
"A person (A) harasses another (B) if (a)A engages in unwanted conduct related to a relevant protected characteristic and (b)the conduct has the purpose or effect of (i)violating B's dignity or (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

68. Section 136 (2) and (3) of the EqA 2010 states
"If there are facts from which the court decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred. But subsection (2) does not apply if A shows that A did not contravene the provision."

69. Pursuant to section 123 of the EqA 2010 proceedings may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period.

70. To succeed in a direct discrimination complaint the Claimant needs to establish on the balance of probabilities less favourable treatment because of the protected characteristic of age. The less favourable treatment is judged against a comparator whose circumstances are materially similar to the claimant and the reason must in some way be tainted by a prohibited characteristic.

71. Section 136 of the Equality Act 2010 has been interpreted as a two stage process. If a prima facie case has been made out and the explanation for that treatment is unsatisfactory then discrimination has to be found by the Tribunal. The Tribunal take into account the guidance provided in **Laing v Manchester City Council & ors (2006) IRLR 748** and **Madarassy v Normura International PLC (2007) IRLR 246;** the Tribunal can take into account the Respondent's

explanation for the alleged discrimination in determining whether the Claimant has established facts which even require an explanation from the Respondent. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. They are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination **Madarassy v Nomura International PLC (2007) IRLR 246**. In **Network Rail Infrastructure Limited v Griffiths Henry (2006) IRLR 865** the EAT clarified unfairness is not in itself sufficient to establish discrimination. In **Ayodele v Citylink Limited (2017) EWCA Civ 1913** the Court of Appeal explicitly confirmed a two stage approach.

72. In respect of harassment, the Equality Act 2010 makes provision to assist in deciding whether conduct has the prohibited effect by taking account of the perception of the complainant; the other circumstances of the case and whether it is reasonable for the conduct to have the effect. In the case of **Richmond Pharmacology v Dhaliwal (2009) IRLR 336** the Employment Appeal Tribunal, gave guidance on the approach to be adopted namely (1)did the alleged perpetrator engage in unwanted conduct; (2)did the conduct identified have (a)the prohibited purpose or (b) the prohibited effect (3)was the conduct related to the protected characteristic. There must be a connection of some sort between the act complained of and the protected characteristic.

73. Section 111A of the Employment Rights Act 1996 states

"111A Confidentiality of negotiations before termination of employment

(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.

This is subject to subsections (3) to (5).

(2) In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this form or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

(5) Subsection (1) does not affect the admissibility on any question as to costs or expenses of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved."

74. The ACAS guidance "Settlement Agreements under section 111A of the Employment Rights Act 1996" dated July 2013 Code of Practice 4 sets out examples of improper behaviour in relation to the settlement agreement discussions or offer. What constitutes improper behaviour is ultimately for a tribunal to decide on the facts and circumstances of each case. Improper behaviour will include (but not be limited to) behaviour that would be regarded as unambiguous impropriety under the without prejudice principle. The ACAS guidance lists a number of examples including age discrimination; not giving the reasonable time to consider the settlement, an employer saying before any form of disciplinary process has begun that if settlement proposal is rejected then the employee will be dismissed.

75. In the case of **Faithorn Farrell Timms LLP v Mrs. S. Bailey (UKEAT/00025/16)** HHJ Eady QC stated that section 111A is looked at on its own terms and not through the lens of common law without prejudice privilege. At paragraph 47 of that Judgment, HHJ Eady QC noted the reference in the Code of Practice paragraph 17

"17. What constitutes improper behaviour is ultimately for a tribunal to decide on the facts and circumstances of each case. Improper behaviour will however include but not be limited to behaviour that would be regarded as unambiguous impropriety under the without prejudice principle."

76. HHJ Eady QC stated that Parliament chose to use the phrase improper behaviour not unambiguous impropriety thus allowing a potentially broader approach to the behaviour in issue and a greater degree of flexibility for the ET (arguably reflective of the broader categories of exceptions allowed by common law to prevent abuse of the without prejudice principle). The Learned Judge noted first it must consider whether there was improper behaviour by either party during the settlement negotiations (a matter for the ET to determine on the particular facts of the case having due regard to the non-exhaustive list of examples at paragraph 18 of the ACAS code). If so it is then up to the ET at the second stage to decide the extent to which confidentiality should be preserved in respect of those negotiations.

Conclusion

77. On the basis that the provisions of section 111A of the Employment Rights Act 1996 do not apply to age discrimination claims, the Employment Tribunal considered it appropriate to adjudicate on the age discrimination claims first prior to considering whether improper behaviour, outside the boundaries of discrimination was applicable.

78. The Tribunal has noted above that on direct questioning of the Claimant by the Tribunal Judge as to why he believed he had been discriminated against because of his age, the Claimant struggled to articulate any reason why he considered his treatment or dismissal was related to his age.

79. Turning to the issues, the Tribunal concludes that the Claimant was not demoted on 8th May 2017 by the First and/or Second Respondent. The Claimant was retained by the First Respondent on the same salary with a view to honing his skills in increasing business sales which was the original purpose of his initial recruitment to the business. In the circumstances that the business found itself in; losing a contract with falling profits it was necessary for it to seek to increase its sales and engage the Claimant to increase its sales. The Tribunal do not find that this was unwanted conduct. In fact the Claimant raised no resistance to the same in his own words (see his notes age page 151).

Furthermore it was not related to the protected characteristic of age. The business having found itself in financial difficulty needed to increase revenue via sales and it was for that purpose only that the Respondent alleviated the Claimant of his administrative duties to focus on sales. The Tribunal do not find that the Claimant was demoted; the focus of his role on sales was emphasised; this was not harassment at all or related to age.

80. Further, the Tribunal do not consider that this was less favourable treatment. The Claimant's change in role was simply to play to his strengths in the interests of the business. A younger employee with the Claimant's competent sales skill would have been treated in exactly the same way. The Claimant's was treatment had nothing whatsoever to do with his age.

81. The Tribunal has already commented that the Claimant had been informed that his equipment and desk space were to be relocated nearer the sales department. Unfortunately due to the availability of IT staff the move of the Claimant's equipment took place at short notice when he was some distance from the work place. The Tribunal finds that the Claimant had not resisted the idea that the Claimant's equipment and desk should be relocated nearer the sales staff; his upset was that it was moved without notice and when he was away from the office. Therefore the Tribunal find the movement of the IT equipment and workstation this not unwanted conduct and in any event was not related to the Claimant's age; it made sense (which the Claimant agreed to) to be relocated nearer the sales staff. The date and time of the move was not communicated to the Claimant because it took place at short notice dependent on the availability of IT staff. Furthermore, the Tribunal concludes that the Claimant was not subject to direct age discrimination. The move of the IT equipment and workstation was not less favourable treatment; it made sense for the Claimant to be located to his team. A younger employee out of the business on the day when the IT staff were available to move the IT equipment would have been treated in precisely the same way.

82. In respect of the allegation that on 17 May 2017 Mr. Boswell without the Claimant's prior knowledge brief the Claimant's team mobility, aftersales and warranty that they no longer reported to him but now reported to Jeff Brown. The Tribunal found no evidence of this. The Tribunal did find that by email dated 19 May 2017 the second respondent emailed Kevin Stevens, Production Manager; Martyn Archer, Managing Director; Graham Hunter, Finance Director and Wes Linton, Head of Engineering about changes to the mobility department. Mr. Boswell informed the senior management team that the claimant had moved over to the sales team as the mobility expert; Roger and Raj were to report to the claimant. The respondent stated *"this move allows our key personnel to focus on their core skills. Giving us a real focus on driving sales into our business and offering greater opportunity to enhance our customer's experience."* The Tribunal finds that this was not unwanted conduct; the Claimant did not resist this suggestion; it did not create a violation of the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. In any event it was unrelated to age.

83. Furthermore, the Claimant was not directly discriminated against because of his age by reason of the email dated 19th May 2017. The Tribunal repeats its finding that this was not less favourable treatment; the Claimant's skills were being used to improve the business sales; he had not expressed an objection to this; and it was not related to the Claimant's age.

84. On 1 June 2017 the Tribunal finds that Mr. Boswell sent an email to Adam Raven, Alan Hunter, Roger Keen and Raj Singh stating that the Claimant was not to be included on the distribution list in an attempt to clarify specific roles going forward in the business. His email was a response to the Claimant's email dated 22 May 2017 (page 128) referred to above whereby the claimant emailed team members to inform them that Jeff Brown had taken over the day to day running of the mobility section/team and going forward reference to him should be made if you have Welcome/In Life checks. The Claimant having accepted the suggestion he focus on improving sales should not have encouraged the team to continue to copy him in to help with any unusual issues. The Tribunal accepts that in order to avoid any confusion Mr. Boswell emailed Adam Raven,

Alan Hunter, Roger Keen and Raj Singh on 1 June 2017 to clarify the changes in line management. This was not an attempt to undermine the Claimant. Even if it was unwanted conduct or if the Claimant felt it was humiliating; it was not reasonable to have that effect bearing in mind clarity needed to be provided about who was doing what function in the business. In any event the Tribunal finds that it was not related to the Claimant's age. The Tribunal finds that it was not an act of direct discrimination either. Any comparator younger than the Claimant who had emailed the team causing potential confusion about the functions they were continuing to perform was likely to have an email sent in the same terms as those sent by Mr. Boswell. The treatment was not less favourable and in any event had nothing whatsoever to do with the Claimant's age.

85. At meetings on 1 August 2017 and 7 August 2017 the Claimant met with Mr. Boswell and Janet Fincham. The Tribunal accepts that these meetings were with a view to terminating the Claimant's employment with the respondent by way of a protected conversation/settlement. The Claimant accepted that he had a choice whether to accept or reject the settlement proposal it was not therefore a presentation of the dismissal as a fait accompli. Although these meetings may amount to unwanted conduct, and the Claimant may have felt humiliated, in the context that meetings were held to discuss "without prejudice" the termination of the Claimant's employment it was not reasonable for the conduct to have the said effect. In any event the Tribunal finds that they were not related to the Claimant's age. Mr. Boswell was unaware of the Claimant's age. Mr. Boswell and Ms. Fincham told the claimant the company was going through a difficult time and still trying to stop losses and some tough decisions needed to be made. Mr. Boswell stated that he had reviewed his structure and saw a different strategic way forward and wished to make the claimant an offer before a formal process. The offer made was for the Claimant to leave his employment on 11 August 2017. The meetings in this context were unrelated to the Claimant's age. Further there was no direct discrimination because of the Claimant's age. A younger man in the circumstances of the Claimant would have been treated in the same way; the Claimant's treatment had nothing whatsoever to do with his age.

86. Mathew Boswell and Janet Finch conducted both dismissal and grievance meetings. Even if the Claimant considered that this was unwanted conduct and was humiliating; in the context that both Mr. Boswell and Mrs. Fincham were decision makers and conducted previous meetings and the grievance was closely related to the dismissal, it was unreasonable to have such an effect. They were best placed to deal with any concerns raised by the Claimant (the concerns having been replicated from solicitor's correspondence). The conduct had nothing to do with age. The Claimant was not directly discriminated against because of his age. A younger employee in the same circumstances as the Claimant would have been treated the same way; the reason for the treatment was nothing whatsoever to do with age.

87. The Tribunal did not find that the Claimant was suspended from work. The Claimant was given the opportunity to be on paid leave to consider his future employment with the Respondent and a proposed termination/settlement agreement. The Claimant was no longer required to attend work because of this reason which had nothing whatsoever to do with his age. A younger employee subject to discussions of a potential termination/settlement agreement would have been treated in precisely the same way. The Claimant was not subject to direct age discrimination.

88. The Claimant was dismissed from work in November 2017 by reason of the fact that the Claimant's role was no longer required in the business because Mr. Boswell, whilst the Claimant was away from the workplace undertook the Claimant's role and spread functions about the workforce. If mutually acceptable terms had been agreed between the parties during negotiations between respective legal advisers at an earlier stage, the claimant's employment would have been terminated earlier. By the time of the Claimant's dismissal in November 2017, the respondent's view was confirmed; his role was no longer required in the business. In these particular circumstances, a younger employee would not have been treated any differently. The Claimant was not directly discriminated against because of his age.

89. The Tribunal now considers the additional section 111A arguments. The Tribunal found the purposes of the meetings between the Respondents and the Claimant on 1 and 7 August 2018 were for the purpose of terminating the Claimant's employment on mutually agreeable terms. The Tribunal did not find that there was improper conduct within the meaning of section 111A (4) of the ERA 1996. The Claimant has run his case on the basis that the Respondent was aware as early as July 2017 that it was likely that the Claimant would be made redundant and should have disclosed this to the Claimant at the two meetings in August and because they did not do so the Respondents were guilty of improper conduct. The Claimant also relies upon this as an allegation that the First Respondent communicated information to the Claimant they knew to be untrue, inaccurate or misleading.

90. The Tribunal accepts that improper conduct can be broadly defined under section 111A of the ERA and as HHJ Eady QC found in the case of **Faithorn**; that it is much wider than the without prejudice rule. The Tribunal found that in July the Respondent did consider that the Claimant was potentially redundant. The way the Respondent chose to phrase this in the meetings in August 2017 was not incompatible with this; they simply did not use the word "redundancy". The Tribunal has already found the respondent told the claimant the company was going through a difficult time and still trying to stop losses and some tough decisions needed to be made. Mr. Boswell stated that he had reviewed his structure and saw a different strategic way forward and wished to make the claimant an offer before a formal process. The offer made was for the Claimant to leave his employment on 11 August 2017. The Tribunal reject there was improper conduct in this respect. The Tribunal does not find the respondent communicated untrue, inaccurate or misleading information.

91. The Claimant also relies upon the dismissal being presented as a fait accompli as improper conduct. The Tribunal has discussed this above. The Tribunal struggle with this concept. The purpose of a protected conversation is to raise the possibility of termination of an employment relationship in the absence of a dispute for mutually acceptable terms. Inevitably it will involve an employer suggesting to an employee that the employment would be terminated. The

Claimant in his evidence accepted that he had a choice whether to accept the settlement or not. The Tribunal finds that although dismissal was discussed and the Claimant was given time off to consider the proposal, he had a choice to accept or reject the offer and in those circumstances the dismissal was not presented as a fait accompli and in any event was not improper conduct within the meaning of section 111A of the ERA.

92. The Tribunal rejects the Claimant's evidence that he was not informed that the discussions on 1 and 7 August 2017 were protected conversations. The Tribunal finds that the Claimant was shocked and surprised about the nature of the meetings and may not have been fully cognisant of the significance of the meetings but on the balance of probabilities the Tribunal are persuaded that it was explained to the Claimant that the discussion was confidential, could not be used in Court and was a protected conversation. There no improper conduct in this regard.

93. The Claimant was not told he had 10 days to consider the offer. In fact the Respondent failed to send to the Claimant the written proposal until 5 August 2017. However the time for the Claimant to consider the proposal was extended. There is no specific duty to inform the Claimant about the time period to consider. The obligation is to permit an employee time to consider. The Tribunal do not find any improper conduct in circumstances that the appropriate amount of time was given to the Claimant to accept or reject as in this case.

94. In the circumstances the Tribunal concludes that there was no improper conduct and it is not just and equitable for evidence of the negotiations in the meetings dated 1 and 7 August 2017 and via correspondence up to 24 October 2017 to be admitted; section 111A of the ERA 1996 applies.

95. The Tribunal will deal with the issue of time briefly. Jurisdiction is a matter for the Tribunal. However, the Employment Tribunal find it disappointing that the Respondent failed to alert the Claimant's representative to this issue in the agreed list of issues. However the Tribunal gave the Claimant's representative

time to make submissions on the same and in fact the Respondent did not cross examine the Claimant about these matters in evidence.

96. The claim form was submitted on 4 January 2018. He obtained a conciliation certificate in respect of the First and Second Respondents in 14 December 2017 and in respect of the Third Respondent on 4 January 2018. The last pleaded act of discrimination is the act of dismissal which took place on 30 November 2017. For the reasons already set out by the Tribunal above it does not find that there were any acts of direct age discrimination and does not accept that there was a continuing state of discriminatory treatment. However, if the Claimant had established discriminatory treatment for earlier matters, prior to dismissal, the Tribunal would have considered it was just and equitable to extend time in the circumstances that parties who seek to reach negotiated settlements on agreeable terms should be encouraged as opposed to being penalised for taking sensible litigation decisions and the Respondent has been unable to establish any prejudice.

97. The claims of age discrimination are dismissed.

98. A further Telephone Preliminary Hearing is listed on 8 October 2018 at 10 a.m. to discuss directions for the unfair dismissal complaint.

Employment Judge Wedderspoon
Dated: 21 September 2018